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06/10/07

(33)

HIGH COURT OF CHHATTISGARH AT BILASPUR
Criminal Appeal No. 450 of 2004

APPELLANT Dundi @ Dhobu

Vs.

RESPONDENT State of Chhattisgarh

Judgment post for 05-10-2007

Sd/-
DHIRENDRA MISHRA
Judge

HIGH COURT OF CHHATTISGARH AT BILASPUR
Criminal Appeal No. 450 of 2004

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APPELLANT Dundi @ Dhobu, S/o Goverdhan, aged about 50 years, R/o Saket Colony Bodhghat, Distt. Bastar (CG)

Vs.

RESPONDENT State of Chhattisgarh, through the District Magistrate, Jagdalpur, Distt. Bastar (CG)

PRESENT: Shri Prafulla Bharat, Advocate for the appellant.
Shri Arun Sao, Additional Public Prosecutor, for the State.

J U D G M E N T
(05-10-2007)

Dhirendra Mishra, J

This appeal is directed against the judgment of conviction and order of sentence dated 27-4-2004 passed in Special Case No. 1/2004 whereby Special Court, NDPS, Bastar at Jagdalpur has convicted the appellant under Section 20-b(ii)B of Narcotic Drugs and Psychotropic Substances Act (Fort short hereinafter referred to as the Act) and sentenced him to undergo R.I. for 4 years and to pay a fine of Rs. 20,000/-, in default of payment of fine, to further undergo R.I. for one year.

2. The case of the prosecution is that on 17-1-2004, Asstt. Sub Inspector Diwakar Upadhyay after receiving secret information that a person in Kumharpara is carrying cannabis in a suitcase for sale, recorded that information in Rojnamcha Sanha and thereafter forwarded the information to City Superintendent of Police, Jagdalpur and proceeded for the place of occurrence along with staff and witnesses and after completing formalities as per the procedure prescribed in Chapter 5 of the Act, seized 6.250 Kg. cannabis which the appellant had kept in a suitcase in a white colored plastic bag. Two samples of 25 gms. each were drawn from the seized contraband and weighment of seized contraband was done. After arresting the accused, the seized contraband, sample bags and the accused were brought to Bodhghat police station. The contraband and the samples were handed over to Malkhana for safe custody. Thereafter Crime No. 20/2004 was registered vide Ex. P-18. Information regarding seizure, arrest and registration of offence was forwarded to the Superintendent of Police, Jagdalpur and samples of the contraband were forwarded to Forensic Science Laboratory, Raipur through

Superintendent of Police and receipt of Ex. P-24 was obtained. FSL report of the contraband confirmed that the seized article was cannabis whereupon charge sheet was filed.

3. During trial, the prosecution examined 5 witnesses. After recording statement of the witnesses and hearing the counsel for the parties, the trial Court convicted and sentenced the appellant as mentioned above.

4. Learned counsel for the appellant submits that as per the case of the prosecution, weighment of the seized contraband, secret information memo, search notice, search recovery memo, identification memo, seal panch memo, seizure memo etc. were prepared in presence of the witnesses. After seizure, the contraband and samples of the contraband were sealed and specimen seal memo of Ex. P-12 was also prepared there, however, after return to the police station, there is no evidence that the contraband was handed over to the in-charge of the police station and there is also no evidence that after taking the charge of articles seized, the in-charge of the police station had affixed his seal over the articles and samples as per requirement of Section 55 of the Act. The appellant was also not forwarded to the in-charge of the police station in accordance with Section 52 of the Act and in report of arrest and seizure provision as contemplated under Section 57 has also not been complied with.

5. Referring to the judgment in the matter of **Gurbax Singh –v- State of Haryana**[1], it was argued that the provisions of Sections 52, 55 and 57 of the Act are directory and violation of these provisions would not ipso facto violate the trial or conviction. However, the I.O. cannot totally ignore these provisions and such failure will have a bearing on appreciation of evidence regarding arrest of the accused or seizure of the article. It was further argued that the version of the Investigating Officer Diwakar Upadhyay is not only un-corroborated from the statement of the only panch witness examined during trial but he also stands contradicted by the statement of Domar Singh Pipariya (P.W. 1) as both the witnesses gave different version with respect to mode conveyance by which they went to the place of incident, the place from where the contraband was seized and the time taken by them to reach there. Reliance is also placed on the

[1] AIR 2001 SC 1002

judgment of this Court in **Sukhchand @ Sudru Das -v- State of Chhattisgarh**[2]. The copy of the Malkhana register of Ex. P-2-c mentions that the sample was sent to FSL through constable Rajauram on 20th January, 2004, however he has not been examined.

6. On the other hand, learned counsel for the State has supported the impugned judgment.

7. I have heard the learned counsel for the parties. I have perused the record.

8. The independent witness Virendra has not been examined whereas witness Kamal Sai has not supported the case of the prosecution and he has turned hostile. Even in the cross-examination, the prosecution could not elicit anything incriminating against the appellant and which corroborates the statement of the P.W. 3 I.O. Diwakar Upadhyay. P.W. 3 Diwakar Upadhyay, the Investigating Officer, has stated that after completing the necessary formalities, suitcase of the accused was searched and a plastic bag containing white powder like Ganja was recovered vide recovery memo of Ex. P-10. Cannabis was got identified by smelling and burning vide Ex. P-11. Weighment was done by Constable Domar Singh (P.W. 1) and on weighment, the cannabis was found to be 6.250 kg. After drawing two samples of 25 gm each, the samples were packed and sealed and remaining cannabis was sealed in the bag and the same was again kept in the suitcase and the suitcase was sealed and accordingly weighment memo was prepared which is Ex. P-1. Thereafter, seizure memo of the contraband and samples was also prepared vide Ex. P-13. After returning to police station, offence was **registered vide Ex. P-18 and information was sent** to the Magistrate and superior officers and thereafter the contraband, samples and other seized articles were deposited in the Malkhana for safe custody from where two samples were sent to the F.S.L. through Superintendent of Police for chemical examination. This witness in para 3 of statement has stated that they proceeded for Kumharpara Warehouse Road by Motorcycle where he found the accused carrying suitcase on the road. In paragraph 8, he has further stated that they proceeded for the place of occurrence at about 14.10 p.m. which is at a distance of 1-1½ km. They proceeded in three different

[2] Cr.A.No.925/2005 decided on 30-1-2006

motorcycles. They were six in numbers including witnesses whereas P.W. 1 Constable Domar Singh Pipariya who was also a member of the raiding party has deposed that after receiving secret information that some person shall be going towards Raipur road with cannabis, he along with ASI Diwakar Upadhyay and two witnesses and other staff went on a jeep to Saket Colony where they found the accused standing on the road waiting for the bus. He was carrying a suitcase. In paragraph 4, he has stated that the place was only ½ km. away from the police station and they took just 5 minutes to reach because they had gone by jeep.

9. It is true that ASI Diwakar Upadhyay after effecting search, seizure and arrest, did not hand over the charge to the in-charge of the police station after return to the police station and as such did not comply with provisions of Sections 52, 55 and 57 of the Act. In the light of the judgment of the Supreme Court in the matter of **Gurbax Singh**[1], the violation of the above provisions ipso facto would not vitiate the conviction however, if we examine the statement of the Investigating Officer Diwakar Upadhyay (P.W. 3) and Constable Domar Singh Pipariya (P.W. 1), we find that there is contradiction in the version of these two witnesses with respect to mode of conveyance, the place where the appellant was found and the distance and time taken to reach the place of incident. The above discrepancy becomes still more significant in the light of the fact that the independent witness Kamal Sai (P.W. 5) has categorically denied that the secret information memo, notice under Section 50 of the Act, search memo of police party, search memo of the accused, recovery memo, identification memo of contraband, weighment memo and seizure memo were prepared in his presence. He has stated that he was engaged in the construction work in the police station when police personnel called him and obtained his signature on the blank papers. In the cross-examination also, he has categorically denied that the investigation as claimed by the police was done in his presence. Non-examination of second witness by the prosecution compels me to draw adverse inference against the prosecution. This Court in the matter of **Sukhchand @ Sudru Das**[2] considering non-compliance of Section 52(3) and 55 of the Act expressing the doubt over the veracity of the FSL report and considering that there was

Sd/-
DHIRENDRA MISHRA
Judge